

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CONSUMERS POWER COMPANY,
a Michigan Corporation, and
THE DETROIT EDISON COMPANY,
a Michigan Corporation,

Plaintiffs,

v

FRANK J. KELLEY, ATTORNEY
GENERAL, RICHARD H. AUSTIN,
SECRETARY OF STATE, and
BOARD OF STATE CANVASSERS,

Defendants.

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No. 86-56487-CZ
HONORABLE ROBERT HOLMES BELL

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DEFENDANTS' BRIEF IN OPPOSITION TO
MOTION FOR SUMMARY DISPOSITION

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Introduction

The constitutional process by which the people of Michigan reserve the power to initiate and pass constitutional amendments without the assistance of the Legislature and in derogation of the Legislature's power has had a long and successful history. See B. Grossman, The Initiative and Referendum Process: The Michigan Experience, 28 Wayne L Rev 77, 78-80 (1980). During this time the people have always had the right to gather signatures from one election for governor to either four months or 120 days prior to the election at which the proposed amendment is to

be voted on, provided another election for governor has not occurred.

In 1973, during the midst of the Watergate scandal, the Legislature passed 1973 PA 24 which provided only 90 days for the people to gather signatures on petitions for the initiation of a constitutional amendment. Later, the Legislature passed 1973 PA 112 which extended the time frame to 180 days. MCL 168.472a; MSA 6.1472(1).

The Attorney General, recognizing that this law placed an undue burden on the people's exercise of the right to initiative under the self-executing Const 1963, art 12, § 2, and contradicted the holding of the Michigan Supreme Court in Hamilton v Secretary of State, 221 Mich 541; 191 NW2d 829 (1923), concluded that MCL 168.4270; MSA 6.1472(1) was unconstitutional. OAG, 1973-1974, No. 4813, pp 171, 173 (August 13, 1974). The Opinion remained unchallenged in Court for the next 11 years.

Plaintiff-utilities now bring this suit founded on MCL 168.492a; MSA 6.1472(1) to prevent the placement of a constitutional amendment on the ballot, circulated by the Michigan Citizens Lobby, which would limit the utilities' ability to pass back the cost of certain of their follies to the taxpayers of Michigan. The petition had originally been approved as to form in September, 1983. This action is brought at a time when, if they prevail, there would be no time to gather sufficient signa-

tures to place the proposed constitutional amendment on the ballot in accordance with MCL 168.472a; MSA 6.1472(1). The Plaintiffs, having had actual or constructive knowledge of the pendency of the petition initiative, have thus delayed the filing of this case to the present, thereby requiring it be barred by the doctrine of laches.

Alternatively, even without the defense of laches, as the Attorney General correctly opined 11 years ago, MCL 168.472a; MSA 6.1472(1) is contradictory to the reasoning of Hamilton, supra, and violates the common understanding of the meaning of Const 1963, art 12, § 2. MCL 168.472a; MSA 6.1472(1) also unconstitutionally places a heavy burden on the people's exercise of their right to initiative without effectively serving any important interest.

Statement of Facts

The parties hereto, for the purposes of Plaintiffs' Motion, have entered into a Stipulation of Facts. However, the following summary is provided.

The 1963 Michigan Constitution followed the 1908 Michigan Constitution in providing for a constitutional initiative. Const 1963, art 12, § 2, states:

"Amendment by petition and vote of electors.

"Amendments may be proposed to this constitution by petition of the registered electors of

this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

"Submission of proposal; publication.

"Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

"Ballot, statement of purpose.

"The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

"Approval of proposal, effective date; conflicting amendments.

"If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail."

On August 13, 1974, the Attorney General of Michigan, in response to a request for an opinion from the Honorable Gary Byker, State Senator, opined that "with regard to signatures affixed to petitions proposing amendment to the State Constitution pursuant to Const 1963, art 12, § 2, § 472a of the Michigan Election law is unconstitutional." OAG, 1973-1974, No 4813, pp 171, 173 (August 13, 1974). The Board of State Canvassers followed this opinion until the present time. Neither the Legislature or any other party has challenged this Opinion until the instant case.

On September 20, 1983, a petition to amend the Constitution, sponsored by the Michigan Citizens Lobby, was approved as to form by the Board of State Canvassers. The petition was slightly modified and was approved again by the Board in April, 1986. The proposals generally seek to prevent certain costs incurred by the Plaintiffs from being passed onto the ratepayers of Michigan.

On or about June 4, 1986, Plaintiffs filed this lawsuit seeking to have this Court prohibit the submission of the proposed constitutional amendment to the electors of this State.

ARGUMENT

I.

PLAINTIFFS ARE BARRED BY THE EQUITABLE DOCTRINE OF LACHES FROM MAINTAINING THE INSTANT CAUSE OF ACTION.

The Opinion complained of by Plaintiffs, OAG, 1973-1974, No 4813, p 171 (August 13, 1974), has been adhered to without challenge for approximately 11 years. The petition form containing the ballot question, which the Plaintiffs seek to prohibit the electors of the State from considering, was approved by the Board of State Canvassers on or about September 10, 1983, with a minor amendment approved by the Board on April 21, 1986. Thus, the Plaintiffs have had actual or constructive knowledge of the existence of the Opinion under challenge for 11 years, and have had actual and/or constructive knowledge of the existence of the proposed constitutional amendment which Plaintiffs claim creates the case or controversy in this matter since September, 1983. Yet Plaintiffs have waited until virtually the eve of the election before bringing the instant case, thus, effectively depriving the people of any opportunity of recirculating petitions to place the proposal on the ballot at the forthcoming election if Plaintiffs are successful. This type of manipulation of the judicial process is exactly the type of proceeding that the equitable doctrine of laches was designed to prevent.

Laches has been defined by the courts as follows:

"Laches is an affirmative defense which depends not merely upon the lapse of time but principally on the requisite of intervening circumstances which would render inequitable any grant of relief to the dilatory plaintiff. Lewis v Poel, 376 Mich 167, 169; 136 NW2d 7 (1965), Root v Republic Ins Co, 82 Mich App 446; 266 NW2d 842 (1978). For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches. Head v Benjamin Rich Realty Co, 55 Mich App 348, 356; 222 NW2d 237 (1974), lv den 393 Mich 792 (1975). See also Wiljamaa v Board of Education of City of Flint, 50 Mich App 688, 692; 213 NW2d 830 (1973). Laches is concerned mainly with the question of the inequity of permitting a claim to be enforced and depends on whether the plaintiff has been wanting in due diligence. Sloan v Silberstein, 2 Mich App 660, 676; 141 NW2d 332 (1966)." In re Crawford Estate, 115 Mich App 19, 25-26; 320 NW2d 276 (1982)

When the validity of elections is being challenged, it is well settled that laches is an appropriate defense. Martin v Soucie, 441 NE2d 131, 133 (Ill App, 1982). Further, it has been recognized that laches is a bar to an action based not only upon the passage of time but based upon substantial detriment to the position of defendants. Martin v Soucie, supra, at 135.

The Plaintiffs have argued in anticipation of the laches defense that the Defendants may not utilize the defense because Defendants have no "interest in the placement of the proposal on the ballot." However, it is respectfully submitted that the

Plaintiffs should be estopped from raising this particular argument inasmuch as a true party in interest with regard to the particular ballot proposal, the Michigan Citizens Lobby, has been prohibited from intervening in this matter based upon the objection of Plaintiffs. Further, it is respectfully submitted that the Defendants, in the interest of upholding their duty to support and defend the Constitution, are directly interested in this matter and will be directly prejudiced as representatives of the people if the right to have access to the ballot for purposes of placing constitutional amendments before the people is thwarted by overturning of the Attorney General's Opinion.

A recent discussion of laches is contained in Lothian v Detroit, 414 Mich 160, 168; 324 NW2d 9 (1982):

"Laches (footnote omitted), the corresponding judicially imposed equitable principle, denotes 'the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant.' Tray v Whitney, 35 Mich App 529, 536; 192 NW2d 628 (1971). The doctrine of laches reflects 'the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.' Walsh, Equity, § 102, p 472. Laches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time, Smith v Sprague, 244 Mich 577; 222 NW 207 (1928); Chamski v Wayne County Board of Auditors, 288 Mich 238; 284 NW 711 (1939); Chesnow v Nadell, 330 Mich 487; 47 NW2d 666 (1951). Instead, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay. As a general rule, '[w]here the situation of neither party

has changed materially, and the delay of one has not put the other in a worse condition the defense of laches cannot be recognized.' (citation omitted). Simply stated 'laches [is concerned] with the effect of delay', while 'limitations are concerned with the fact of delay'. (citations omitted). Like its legal counterpart, laches is pled as an affirmative defense. (citations omitted)."

Based upon the foregoing, it is respectfully submitted that the instant case's factual setting is directly suited for the application of the doctrine of laches. Plaintiffs have had actual or constructive knowledge of the Opinion of the Attorney General for approximately 11 years and have been fully aware of the petition of the Michigan Citizens Lobby since approximately September, 1983. Yet, Plaintiffs chose to sit on their remedies and wait until the eleventh hour prior to bringing their case to the attention of the courts thereby depriving the people of any reasonable opportunity to recirculate petitions and place the proposed constitutional amendment on the ballot at the next election. Thus, it is respectfully submitted that it is inappropriate for the Court to consider the merits of Plaintiffs' Complaint at this point in time due to the excess delay in bringing the action to the attention of the courts.

In the event that the Court decides to consider the merits of this issue despite the laches defense presented, infra, the following arguments are, therefore, presented in the alternative.

II.

THE LEGISLATURE HAS NO POWER TO ADOPT A LAW
GOVERNING THE TIME PERIOD WITHIN WHICH
SIGNATURES ON A CONSTITUTIONAL INITIATIVE
PETITION WILL BE DEEMED VALID.

Const 1963, art 12, § 2, is a "self-executing" provision reserving to the people the power to initiate constitutional amendments because of legislative failures to keep their promises. Ferency v Secretary of State, 409 Mich 569, 590-592; 297 NW2d 544 (1980) (per curiam). In order to protect the people's right to initiate constitutional amendments and other similar rights, the courts have "liberally construed" self-executing provisions to protect the initiative, Kuhn v Department of Treasury, 384 Mich 378, 385; 183 NW2d 796 (1971), and "jealousy guard[ed]" the people's right to initiate constitutional amendments from legislative encroachment. Ferency, supra, p 601. This long tradition and the common understanding of Const 1963, art 12, §2, requires finding that Legislature had no power to enact MCL 168.472a; MSA 6.1472(1).

A. The 180 Day Rebuttable Presumption
Contradicts The Time Period Set
Out In Const 1963, art 12, § 2.

The "total vote cast for all candidates for governor at the last preceding general election at which a governor was elected" determines the number of signatures required on the initiative petition. 1963 Const, art 12, § 2. It also necessarily deter-

mines the period during which signatures on an initiative petition are valid.

In Hamilton v Secretary of State, 221 Mich 541, 544-545; 191 NW2d 829 (1923), the Court construed Const 1908, art 17, § 2, which used "[t]he total number of votes cast for governor at the regular election last preceding the filing of an amendment to the Constitution," (emphasis added), to "fi[x] distinct periods within which initiatory action may be instituted" because the vote for governor "fixe[d] the basis for determining the number of legal voters necessary to sign." (Emphasis in original.) "[A] petition must be circulated after one election for governor and filed at least four months before another election for governor." Id, p 546. Under Const 1963, art 12, § 2, the same rule applies as modified by the change to a quadrennial election for governor. Petitions may be circulated from one election for governor to 120 days before another election for governor or 120 days before the election at which the proposed amendment is to be voted on, whichever is earlier.

The Hamilton Court explicitly rejected the argument "that signatures to an initiatory petition must be attached within a reasonable period before its filing" because "[t]he Constitution speaks on the subject" as described above. Hamilton, supra, p 544. As under Hamilton, Const 1963, art 12, § 2, fixes distinct time periods within which petitions to initiate a

constitutional amendment may be circulated and deprives the Legislature of any power to regulate such time periods.

Plaintiffs' attempts to distinguish Const 1908, art 17, § 2, from Const 1963, art 12, § 2, are not successful. First, while Const 1963, art 12, § 2, permits the Legislature to act in some areas not explicitly covered by its language, the provision is completely self-executing and "does not depend upon statutory implementation." Ferency, supra, p 590-591 (footnote omitted). Where the Constitution has addressed an issue, the Legislature cannot amend or change it. Pillon v Attorney General, 345 Mich 536, 547; 77 NW2d 257 (1956); Hamilton, supra, p 544.

Second, Plaintiffs attempt to distinguish Const 1908, art 17, § 2, as framed when interpreted in Hamilton, supra, from Const 1963, art 12, § 2, by an overtechnical reading of the relevant language in each of the provisions. Both the Const 1908 art 17, § 2 and the Const 1963, art 12, § 2, use the total vote cast for governor to determine the number of signatures necessary on a petition. This was the "primary essential" constitutional step which supported the Hamilton Court's reasoning and it remains the same. Hamilton, supra, p 544.

Third, Plaintiffs ignore the history of Const 1908, art 17, § 2. The combining of two sentences in Const 1908, art 17, § 2, to eliminate repetition and the concomitant deletion of the word "basis" and the infinitive form of the verb "sign," on which

Plaintiffs rest much of their argument, occurred by amendment in 1941, not in 1963, as Plaintiffs have mistakenly surmised. J.R. No 1, ratified at election April 7, 1941. Hamilton, supra, remained good law. See, 2 OAG, 1957-1958, No 3330, p 278 (October 20, 1958); OAG, 1952-1954, No 1802, p 366 (July 26, 1954); OAG, 1949-1950, No 859, p 67 (November 30, 1948); OAG, 1941-1942, No 22135, p 449 (December 16, 1941). Const 1963, art 12, § 2 made only minor language changes in the sentence at issue. Thus, this argument of Plaintiffs must be disregarded.

Finally, Plaintiffs rely on the case State ex rel Kiehl v Howell, 77 Wash 651; 138 P 286 (1914), the narrow language which gives the Legislature the power to regulate some details of the procedures of the initiative, and a short reference to Kiehl by one judge of the Court of Appeals in Wolverine Golf Course v Secretary of State, 24 Mich App 711, 731-732; 180 NW2d 820 (1970) (Opinion of Chief Judge Lesinsky), aff'd, 384 Mich 461; 185 NW2d 392 (1971), in an attempt to undermine the authority of Hamilton, supra. The simplest answer to Plaintiffs' arguments is that it is the Michigan Constitution which MCL 168.472a; MSA 6.1472(1) offends. The Washington Constitution with its broad language permitting the Legislature to facilitate the initiative is not relevant on whether Hamilton, decided nine years after Kiehl, is good authority in Michigan.

Further, Court of Appeals Chief Judge Lesinski (the other judge who joined Lesinski concurred only in the result) discussed

Kiehl only to distinguish it from the case before him in which he held MCL 168.472; MSA 6.1472 unconstitutional. The Lesinski Opinion did not consider Const 1963, art 12, § 2, or the issue presented in this case. The Michigan Supreme Court in affirming the issuance of a writ to compel acceptance of an initiative petition for canvass and immediate submission to the legislature, never addressed Kiehl. In Ferency, supra, p 593, where the Michigan Supreme Court did consider Const 1963, art 12, § 2, the Court was willing only for argument's sake to "assum[e] that the Legislature can impose minimal burdens to keep the process fair, open and informed." (Footnote omitted.) *

Plaintiffs, in an additional argument made in their Supplemental Brief, read Citizens for Capital Punishment v Secretary of State, 414 Mich 914 (1982) (Opinion denying leave to appeal) too broadly. The Citizens Court merely found that "in this instance" the Legislature had properly exercised the right to regulate details on the form and manner of circulation. Id, p 95 (emphasis added). The Citizens Court did not address Hamilton or the issues present in this case.

Thus, it must be concluded that the 180 day rebuttable presumption established by MCL 168.472a; MSA 6.1472(1), conflicts with the time frame established by Const 1963, art 12, § 2, and cannot stand. OAG, No. 4813, supra, p 174.

B. The 180 Day Rebuttable Presumption
Contradicts The Common Understanding
That Const 1963, Art 12, § 2 Would
Not Significantly Change The Right
To Initiative As It Existed Under Const
1908, art 17, § 2.

As discussed immediately above, under Const 1908, art 17, § 2, the circulator of an initiative petition for a constitutional amendment had between one election for governor and four months prior to the election at which the proposed amendment is to be voted on to gather the necessary signatures to place the constitutional amendment on the ballot. Hamilton, supra, p 546. The common understanding of the people and of the members of the constitutional convention was that only the explicit time limits contained in Const 1963, art 12, § 2, limited the circulation of petitions and that Const 1963, art 12, § 2, was to continue the same system without significant change.¹

"'A Constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the

¹To determine the meaning of Const 1963, art 12, § 2, the court may examine the history of the initiative, including the debates of the Constitutional Convention, the committee reports, and other circumstances surrounding the adoption of Const 1963, art 12, § 2. Wolverine Golf Club v Secretary of State, 24 Mich App 711; 180 NW2d 820 (1980) (Opinion of Chief Judge Lesinski and Judge Levin), aff'd, 384 Mich 461,465; 185 NW2d 392 (1971).

people, and that it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed," (Cooley's Constitutional Limitations [6th ed], 81.)'" Michigan Farm Bureau v Secretary of State, 379 Mich 387, 391; 151 NW2d 797 (1967); quoted in Kuhn v Department of Treasury, supra, p 384.

The common understanding of the people who ratified the 1963 Constitution was that the explicit time limits in art 12, § 2, were the only time constraints on the circulation of petitions. Const 1963, art 12, § 2, requires the circulator of an initiative petition must begin after one election for governor. Hamilton, supra, p 546. Const 1963, art 12, § 2, explicitly requires the circulator to file the petition "with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon." Const 1963, art 12, § 2, does not contain any other time limits relating to the circulation of petitions other than the above time frame.

The common understanding of any person reading Const 1963, art 12, § 2, would be that it continued, essentially unchanged, the initiative as practiced under Const 1908, art 17, § 2. The language of Const 1963, art 12, § 2, remained very similar to the language of Const 1908, art 17, § 2, as amended in 1941. Very few substantive changes were made.

The comments and the Address to the People did not suggest that the time frame for circulating petitions was to be changed. The Address stated:

"This is a revision of Sections 2 and 3, Article XVII, of the present constitution, eliminating unnecessary language and making these changes:

"1. References to 'months' in the present section are changed to the appropriate number of 'days'. Hence 'two months' becomes '60 days' and 'four months' is changed to '120 days'.

"2. Amendments approved become effective 45 days after election instead of the 30 days now specified.

"3. Details as to form of petitions, their circulation and other elections procedures are left to the determination of the legislature.

"4. The section provides that if two or more amendments approved at the same election conflict as to substance, the amendment receiving the highest affirmative vote is to prevail." 2 Official Record, Constitutional Convention 1961, p 3407. (emphasis added.)

In Kuhn, supra, pp 385-386, the Court narrowly interpreted the words "deficiencies in state funds." contained in Const 1963, art 2, § 9, to protect the people's right to a referendum on a revenue statute. In so doing, the Court stated: "[i]f the drafters of the constitution wanted the people to more severely restrict the reserve power of referendum, they should have plainly so advised." Id.

Moreover, the delegates to the Constitutional Convention pre-supposed and intended that signatures on a petition to initiate a constitutional amendment would be good for the period in between elections for governor. Delegate Donnelly responded to arguments that a maximum was needed on the number of signatures necessary to initiate a constitutional amendment by stating: "I cannot imagine anything so vital that it couldn't take one year or two years if it has to be done." 2 Official Record, supra, p 2464. The number of signatures gathered was the requirement for the initiation of a constitutional amendment and not the time frame within which they were gathered other than between elections for governor. See 2 Official Record, supra, p 2460, Comments of Delegate Durst (where he noted that the UAW-CIO can probably raise any number of signatures, but that it will take them "a little more time").

The delegates clearly understood that the shorter the time period during which signatures may be gathered, the more difficult it is to gather signatures and adjusted the number of signatures necessary accordingly. In the debates over Proposal 118 which became Const 1963, art 2, § 9, delegate Kuhn distinguished between the smaller number of signatures required to initiate a referendum on a law as opposed to initiating a statutory law by stating: "The difference is the time limit. After a statute is passed by the legislature, there are 90 days before it goes into effect. And the reason for this [sic] 90 days is to

give the people time to go out and get those petitions." 2
Official Record, supra, p 2395.

The Constitutional Convention debates illustrate that the delegates intended to continue essentially the same system as under Const 1908, art 17, § 2. The Chairman of the Committee on miscellaneous provisions and schedule which submitted the Committee Proposal 65, which became Const 1963, art 12, § 2, without any amendments affecting this issue, stated:

"These proposed sections [art 12, § 2, ¶¶ 1 and 2], then would ordinarily be used only when the legislature has failed or refused to act. For that reason, the committee felt that essential detail ought not be left to the legislature to enact.

"The committee believes that these proposed sections do not substantially affect the ease or difficulty of proposing constitutional changes." 2 Official Record, supra, p 2459, Comments of Mr. Erickson.

Mr. Erickson later stated "this is essentially the same as obtained in the present constitution." Id. p 3005.

The studies done for the Michigan Constitutional Convention recommend continuation of the same system. Daniel S. McHargue recommended:

"(5) Retain the constitutional initiative (Art. XVII, § 2,) but reduce the petition requirement to eight percent.

* * *

"It can be seen that the author is reasonably well satisfied with the current constitutional provisions for direct government The provisions for legislative proposal of amendments and constitutional revision are very satisfactory as are those for constitutional initiative." D. McHargue, Michigan Constitutional Convention Studies, No. 17, Direct Government in Michigan, Initiative Referendum, Recall and Revision in the Michigan Constitution, p 58 (1961).

Sidney Glazer stated:

"The present method of submitting amendments by joint resolution of the legislature or by initiatory petitions, appears to be satisfactory." S. Glazer, Michigan Constitutional Conventions Studies, No. 4, Rejected Amendments to the Michigan Constitution 1910-1961, p 4 (1961).

Plaintiffs misinterpret the history of the Constitutional Convention Debates in their effort to make their case.

Delegate Stevens, who cosponsored the amendment deleting the 300,000 maximum, supported his amendment in order to eliminate the possibility that, with future growth in the population of Michigan, more signatures would be required for a statutory initiative petition, which while tied to only 8% percent of the vote for governor, had no maximum, than for the constitutional initiative. 2 Official Record, supra, pp 2462, 3199; see also comments of Delegate Donnelly, id, p 2464. The common understanding, as described above, must control.

The common understanding of any reasonable person reading Const 1963, art 12, § 2, as well as the intent and understanding

of the delegates to the constitutional convention, was that the time frame for the circulation of petitions would continue to be from one election for governor to four months or 120 days before the election at which the proposed amendment is to be voted on or the next election for governor, whichever is earlier, and that the method and manner of circulating petitions would not significantly change. Limiting the time period in which petitions may be circulated by creating a rebuttable presumption that any signature over 180 days old is stale and void significantly changes the prior system and the burden on the people's right to exercise the initiative. MCL 168.472a; MSA 6.1472(1), therefore, cannot stand. See Kuhn, supra.

C. Const 1963, art 12, § 2, Does Not
 Authorize MCL 168.472a; MSA 6.1472(1),
 By Permitting The Legislature To Enact
 Details As To The Form Of The Initiative
 Petitions And Their Circulation.

Const 1963, art 12, § 2, states that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." It further provides that the "person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition." These provisions do not authorize the Legislature to change the time frame within which petitions for constitutional amendment proposal may be circulated.

The provision stating "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law" is the only language granting the Legislature any power to legislate in this area. The second provision concerning the duties of the "person authorized by law to receive such petition" does not provide any extra power. The phrase "as provided by law" serves as a limitation on the power of the person to prevent the person from interfering with the people's right to exercise the initiative.

The former provision provides the Legislature only with the authority to regulate "details as to the form of petitions, their circulation and other election procedures," Address to the People, 2 Official Record, supra, p 3407, not to restrict the people's right to amend the Constitution under the guise of regulating details. See Wolverine Golf Club v Secretary of State, 24 Mich App 711, 735 (Opinion of C.J. Lesinsky); aff'd, 384 Mich 461, 180 NW2d 820 (1970), aff'd, 384 Mich 461; 185 NW2d 392 (1971). Restricting the time period within which signatures must be gathered significantly restricts the people's right to initiate constitutional amendments. OAG, 1973-1974, No. 4813, supra, p 173; Section II, C, infra. It cannot be considered a detail.

Moreover, the explicit language of Const 1963, art 12, § 2, interpreted in accordance with the reasoning of Hamilton, supra,

sets the time period within which signatures may be gathered. Specific provisions control over general provisions. 16 Am Jur 2d, Constitutional Law, § 103, p 443.

Finally, the common understanding and the understanding of the constitutional convention delegates of Const 1963, art 12, § 2, was that it continued the system set up under Const 1908, art 17, § 2, essentially unchanged. See Section I.B., supra. It granted the Legislature no new power to legislate in the area except as to details. Delegate Durst, in presenting Committee Proposal 65, stated:

"The proposal [No. 65] that has just been read by the secretary eliminates a great deal of material that was previously in the constitution. We have tried to include the bare skeleton of the provision in order to still keep it self-executing without providing all the varied material as to how names are to be set forth and all of this type of thing which is presently provided for in the statutes of this state." 2 Official Record, supra, p 2460 (emphasis added.)

Under Const 1908, art 17, § 2, the Legislature had no authority to legislate a different time period. Hamilton, supra. Likewise, under Const 1963, art 12, § 2, the Legislature has no power to enact MCL 178.472a; MSA 6.1472(1).

The Constitutional Convention Debates contradict the argument that the delegates intended Const 1963, art 12, § 2, to abrogate Hamilton or that Const 1963, art 12, § 2, gave the Legislature

power to legislate the time period within which signatures on a petition to initiate a constitutional amendment may be granted. Delegate Donnelly, in response to the argument that deleting a maximum number of signatures required would force petition drives to continue too long and to be too hard stated that "I cannot imagine anything so vital that it couldn't take one year or two years if it has to be done." 2 Official Record, supra, p 2464.

As previously discussed, Plaintiffs read Citizens for Capital Punishment v Secretary of State, supra, too broadly. The Citizens Court addressed only the legislation before it and did not approve all possible legislation the Legislature might enact under the rubric of regulating the manner of circulation. If a statute, as with MCL 168.472a; MSA 6.1472(1), significantly restricts the "jealously guarded" right of initiative, then the statute cannot stand. Ferency, supra, p 601. Otherwise, under the guise of regulating details, the Legislature could extinguish the people's right to initiative.

III.

THE 180 DAY REBUTTABLE PRESUMPTION IS INVALID
BECAUSE IT IMPOSES A SIGNIFICANT AND UNDUE
BURDEN ON THE RIGHT TO INITIATE A CONSTITUTIONAL
AMENDMENT.

A. Const 1963, Art 12, § 2, Is Self-Executing

"Const 1963, art 12, § 2 provides for the exercise of the right of popular amendment and describes the conditions imposed

on that right. This section is self-executing--it does not depend upon statutory implemenation." Ferency v Secretary of State, 409 Mich 569, 590-591; 297 NW2d 544 (1980) (per curiam) (footnotes omitted).

B. The Legislature May Not Place An Undue Burden On The Exercise Of The Right To Petition For A Constitutional Amendment Under Const 1963, Art 12, § 2.

Const 1963, art 12, § 2 "would ordinarily be used only where the Legislature has failed or refused to act," 2 Official Record, supra, p 2459, Comments of Mr. Erickson, and is "in derogation of the power of the Legislature." Id, p 2460, Comments of Mr. Durst. "Michigan courts have actively protected and enhanced the initiative and referendum power" in a long line of cases, Ferency, supra, p 602, by, in part, forbidding the Legislature from imposing any additional obligations upon the exercise of the right to initiative and by forbidding the Legislature from placing any "undue burden" or unduly restricting the exercise of the right to initiative under the pretense of supplementing the provisions of art 12, § 2. Id, pp 589-593.

Michigan Courts have struck down or narrowly interpreted several laws in order to protect the people's right to the initiative. In Ferency, supra, the Michigan Supreme Court interpreted MCL 168.482; MSA 6.1482 very narrowly in order to protect the right to initiative. In Wolverine Golf Club v

Secretary of State, 384 Mich 461; 185 NW2d 392 (1971), the Court held that a law which required initiative petitions gathered under Const 1963, art 2, § 9, to be filed not less than ten days before the start of a legislative session unduly restricted the utilization of the initiative petition. In Hamilton v Secretary of State, 227 Mich 111; 198 NW2d 843 (1924), the Court struck down 1923 PA 204 which imposed certain requirements on the exercise of initiative under Const 1908, art 17, § 2.

In order to continue this "tradition of jealously guarding against legislative and administrative encroachment on the people's right to propose laws and constitutional amendments through the petition process," Ferency, supra, p 601 (emphasis in original), MCL 168.472a; MSA 6.1472(1), must be struck down as imposing an undue burden on the exercise of the initiative.

C. The 180 Day Rebuttable Presumption
 Imposes A Significant Burden On The
 Exercise Of The Initiative Under
 Const 1963, Art 12, § 2.

The 180 day rebuttable presumption in MCL 168.472a; MSA 6.1472(1) imposes a significant burden on the exercise of the right to initiative by effectively reducing the amount of time a petition may circulate. In Turley v Bolin, 27 Ariz App 345; 554 P 2d 1288 (1976), the Court² held that a law requiring

²The Turley Court affirmed the decision of Sandra D. O'Connor denying the Plaintiffs' request for injunctive relief prohibiting the placement of an initiative proposal concerning nuclear power on the ballot. Id., 554 P 2d, p 1289.

that initiative petitions be filed no later than five months preceding the date of the pertinent election was an unconstitutional hinderance of the people's right to initiate legislation when the applicable constitutional provision provided that the initiative petition must be filed any time prior to four months preceding the date of the pertinent election.

Plaintiffs alleged in Turley that four months did not provide a reasonable amount of time for the electorate to understand and become familiar with the proposed measure or to permit proper and reasonable investigation of the petitions to expose fraud and insufficiency of the petitions. The Turley Court, however, found these reasons inadequate in view of the "substantial shortening of the filing period which would result from our holding § 19-121D valid" which "could seriously limit the reserved rights of the people to initiate legislation." Id; 554 P 2d, p 1292. The Court further stated:

"For example, if the required filing date is to be five months before the next general election, rather than the four months provided by the constitution, the time interval between the normal recessing of a legislative session and the required filing date would necessarily be reduced by one month. We cannot say that this substantial reduction when viewed in this context would not 'unreasonably hinder or restrict' the right of the people to initiate legislation when disappointed by the failure of their elected representatives to pass desired legislation prior to recessing." Id.

Experience in Michigan with the referendum which has only a

90 day time period for gathering signatures demonstrates the importance of the time period within which a person may gather signatures. The referendum has been used very sparingly. In contrast, the initiative has been used much more frequently because of the longer time period within which to gather signatures. C. Price, The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon, 28 W Pol. Q. 243, 245 (1975).

The substantial practical and scholarly evidence demonstrate that a 180 day period is a significant burden on the peoples' right to exercise the initiative.

Plaintiffs' reliance on OAG, 1975-1976, No. 4964, p 403 (April 19, 1976) is ill-placed as a reading of the Opinion demonstrates. OAG, 1975-1976, No 4964, supra, p 405, interpreted Const 1963, art 2, § 8, which is not self-executing.

The 180 day rebuttable presumption, by favoring special interest groups, is contrary to the intent of Const 1963, art 12, § 2 to reserve certain powers to the broad spectrum of Michigan citizens in order to combat special interests and recalcitrant legislators. In the Debates in the Constitutional Convention over Proposal 65 and the inclusion of a 300,000 maximum on the number of signatures required in Const 1963, art 12, § 2, the constitutional convention delegates recognized again and again the danger of only special interest groups being able to place

constitutional amendments on the ballot. Delegate Durst stated in support of the inclusion of a 300,000 maximum on the number of signatures required:

"Now I don't think that there is any doubt that no matter how high this figure gets--even if you have to get millions of signatures in the State of Michigan--that the UAW-CIO would be able to put an amendment on the ballot if they so desired. Sure, it may cost them a little more. It may take a little more time and a little more effort, but they can do it. By the same token, Mr. Powell's organization, the Farm Bureau, if it really wants to put an amendment on the ballot has got the membership and also, I presume, the money--that I am not so sure of--but at least they have the facilities to put an amendment on the ballot if they really want to. I suppose there are other organizations that are similarly well organized. Probably the school groups, if they had an amendment they were particularly interested in, would be able to organize the manpower and the funds to put that particular amendment on the ballot. But I submit that the great bulk of the rest of the people of this State, who belong to none of these well organized organizations, would not be able to significantly participate in a drive to put an amendment on the ballot when this figure gets so high that it becomes too costly. Now I am concerned about this because I do not belong to either one of the large organizations I mentioned" 2 Official Record, supra, p 2460 (emphasis added.)

Delegate Cushman stated:

"Now, believe me, it takes a tremendous amount of organization, particularly where you are dependent on volunteers to get this many names [the 300,000 maximum on names being discussed] in valid names. I think that unless it were a professional organization I don't think that a much bigger limit could be reached, and I mean

by a professional organization one that had enough money to pay for their name and their circulation of it." Id, p 2462.

Delegate Romney stated in support of a 300,000 maximum on signatures required:

"As I see this proposal, it is designed primarily to enable citizens to use this route to secure constitutional amendment. Now as a rule they are not too well organized, and I want to emphasize what has been said here about the great difficulty in securing the votes needed to call this convention and then we only require 225,000, but we secured over 300,000 in order to have the overage to make good any signatures not properly secured, because there is a great deal of technicality required in securing valid signatures. So I think that if we should strike out the 300,000 figure we would make it very unlikely that a genuine citizens' petition drive could bring about an amendment for a constitutional convention of this character. It took a great deal of organized effort to get this one called on this basis and I certainly hope that you will defeat this amendment [deleting the 300,000 ceiling on required signatures] because I think the citizens of the State should have a target that is within their reach." Id, p 2463. (emphasis added.)

Finally, Delegate Norris in support of Delegate Romney's point stated:

"And if I sense anything--as a person who has been active in the last 25 years in a variety of efforts--it is that most people feel that the political wall is too high to jump, that ordinary citizens cannot accomplish change, and this leads to a state of apathy and inertia which, in my judgment, is very dangerous

in a democratic society. There has to be a holding forth of the possibility to adjust to change on behalf of ordinary people, not merely--and I think that Mr. Romney made an excellent point here--not merely people who are organized in a political group or on an economic basis but citizens' groups, generally." Id, p 2464.

The Michigan Constitutional Convention Delegates' comments parallel the general understanding of the history and purpose of the initiative and the referendum.

"While it has been held that the idea of direct legislation is as old as government, the adoption of the initiative and referendum as a part of the organic law in some jurisdictions came about as the result of the growth of dissatisfaction and distrust of the people for their legislative bodies and because of the increase of corruption in legislation due to the power and influence of large corporations and powerful groups of individuals, and was not due to any willful or perverse desire of the people to exercise the legislative function directly." 82 C.J.S., Statutes, § 116, pp 193-194 (emphasis added.)

The 180 day rebuttable presumption strongly favors well organized, well funded, special interest groups who can gather the necessary signatures within the short time frame. See Comments of Constitutional Convention Delegates above. The 180-day rebuttal presumption strongly hinders the citizens' groups which the initiative was reserved for and which do not have the money and organization to gather signatures so quickly.

Finally, the 180 day rebuttable presumption places a significant administrative burden in front of any circulator of a petition. There is no administrative procedure set up for challenging the rebuttable presumption. MCL 168.472a; MSA 6.1472(1) also "does not provide what type or quantum of proof is sufficient to overcome the presumption." OAG, 1973-1974, No 4813, p 172.

Even if a procedure was set up for people to challenge the rebuttable presumption, the procedure would require delicate and fine judgments of fact and law. As stated in Ferency, supra, p 609:

"The people, in reserving to themselves the power to amend their Constitution through a self-executing process, cannot have intended to require state election officials to make complex judgments which would require judicial imprimatur in order to establish that the election officials had properly performed their duties under Const 1963, art 12, § 2."

If any presumption is to be engaged in with respect to a self-executing provision, that presumption should be that signatures are valid in order to further the people's exercise of the initiative. Cf. State of Nebraska, ex rel Morris v Marsh, 183 Neb 502, 521, 529; 162 NW2d 262, 268 (1968).

D. The 180 Day Rebuttable Presumption Does Not Effectively Serve Any Important Purpose.

The Plaintiffs set forth a series of allegations why MCL 168.472a; MSA 6.1472(1) is needed to protect a process with which the people of the State of Michigan are well satisfied and which has worked well for over 40 years. From the scant and hurried legislative history, it is impossible to know the legislative intent in passing MCL 168.472a; MSA 6.1472(1), but the Plaintiffs have adduced several reasons for the passage of MCL 168.472a; MSA 6.1472(1). None of these reasons are sufficient to support the significant burden MCL 168.472a; MSA 6.1472(1) places on the people's exercise of the right of initiative.

Plaintiffs allege in general that MCL 168.472a; MSA 6.1472(1), will generally help avoid fraud and abuse. There is no history of significant fraud and abuse in Michigan. McHargue, supra, p 29, 35.

Finally, the Secretary of State has adequate power to prevent fraud and abuse. The Secretary of State may refuse to count duplicate signatures and otherwise declare improper signatures invalid. Citizens for Capital Punishment v Secretary of State, 414 Mich 913 (1982).

Plaintiffs argue that the 180 day rebuttable presumption rule assures that the persons signing the petitions are still residents of and registered voters of the State. First, these are not important reasons. Once the people have voted on the constitutional amendment, the registered voters of the State will have

expressed their opinion. Second, MCL 168.472a; MSA 6.1472(1) serves these purposes very poorly. MCL 168.472a; MSA 6.1472(1), only provides that signatures gathered prior to 180 days before the initiative petition is filed with the Secretary of State are rebuttably presumed to be stale and void. If the petition is filed well before the next scheduled election, then the 180 day rebuttable presumption will serve little purpose because an initiative petition filed very early during the period before the upcoming election would still have this problem. Thus, this argument also lacks validity.

Finally, the Plaintiffs argue that the 180 day rebuttable presumption insures that the petition reflects the will of the people signing it in that, over a longer period of time, intervening acts of the Legislature or agencies of the executive branch may result in the desired action being taken other than by constitutional amendment with the result that the petition is no longer representative of the will of the people signing it. This argument fails for the same reasons as before. First, the issue of whether or not the constitutional amendment is representative of the will of the people will be resolved when the people vote on it. Second, the 180 day rebuttable presumption rule serves this purpose very poorly because an initiative petition filed very early in the process will have the same problem.

This last argument fails for further reasons. Third, the

argument cuts too broadly. Plaintiffs' argument would apply to any procedure set up for initiating a constitutional amendment and would support any time frame no matter how short. Fourth, this argument is contradictory to the reasoning underlying the initiative. The people exercise the constitutional initiative where the Legislature has failed to act and where the people have no realistic expectation that the Legislature or executive will act. L. Sirico, The Constitutionality of the Initiative and Referendum, 65 Iowa L. Rev 637, 660 (1980).

Fifth, the Constitutional Convention Debates clearly demonstrate that the number of signatures and not the time within which they are gathered are the check place on the exercise of the initiative. See discussion above, Section IB. In fact, limiting the time period will discourage the debate and discussions which inform the electorate. Cf., Official Record, supra, p 3200, comments of G.E. Brown.

CONCLUSION

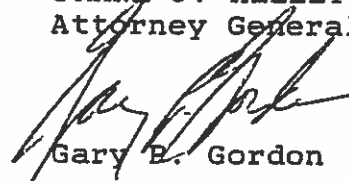
Plaintiffs have failed to timely bring this action, thus barring its consideration based upon the doctrine of laches. However, even if the action had been timely filed, it must fail due to lack of merit. MCL 168.472a; MSA 6.1472(1) violates the plain language and common understanding of Const 1963, art 12, § 2 which provides that initiative petitions may be circulated from one election for governor to 120 days before the election at

which the proposed amendment is to be voted on, provided another election for governor has not occurred. MCL 168.472a; MSA 6.1472(1) also places a significant burden on the exercise of the right of initiative without any corresponding clear benefit. MCL 168.472a; MSA 6.1472(1) demonstrates a profound suspicion and distrust of the initiative procedure contrary to the whole idea of the constitutional initiative as it has been successfully practiced for 40 years in the State of Michigan.

WHEREFORE, Defendants respectfully pray that this Court will deny Plaintiffs' Motion for Summary Disposition and grant Defendants' Summary Disposition and dismiss Plaintiffs' Complaint pursuant to MCR 2.116.

Respectfully submitted,

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Dated: July 15, 1986
CON-B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CONSUMERS POWER COMPANY,
a Michigan Corporation, and
THE DETROIT EDISON COMPANY,
a Michigan Corporation,

Plaintiffs,

v

No. 86-56487-CZ
HONORABLE ROBERT HOLMES BELL

FRANK J. KELLEY, ATTORNEY
GENERAL, RICHARD H. AUSTIN,
SECRETARY OF STATE, and
BOARD OF STATE CANVASSERS,

Defendants.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Todd B. Adams, being first duly sworn, deposes and says that he served a copy of Defendants' Brief in Opposition to Motion for Summary Disposition upon attorneys for Plaintiffs in the above-entitled matter by personally delivering same to them.

Todd B. Adams
Todd B. Adams

Subscribed and sworn to before me
this 15th day of July, 1986

Julie A. Denny
Julie A. Denny, Notary Public
Ingham County, Michigan
My commission expires May 9, 1987